MORALS OFFENSES AND THE MODEL PENAL CODE

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What are the "offenses against morals"? One thinks first of the sexual offenses, adultery, fornication, sodomy, incest, and prostitution, and then, by easy extension, of such sex-related offenses as bigamy, abortion, open lewdness, and obscenity. But if one pauses to reflect on what sets these apart from offenses "against the person," or "against property," or "against public administration," it becomes evident that sexual offenses do not involve violation of moral principles in any peculiar sense. Virtually the entire penal code expresses the community's ideas of morality, or at least of the most egregious immoralities. To steal, to kill, to swear falsely in legal proceedings—these are certainly condemned as much by moral and religious as by secular standards. It also becomes evident that not all sexual behavior commonly condemned by prevailing American penal laws can be subsumed under universal moral precepts. This is certainly the case as to laws regulating contraception and abortion. But it is also true of such relatively uncontroversial (in the Western World) "morals" offenses as bigamy and polygamy; plural marriage arrangements approved by great religions of the majority of mankind can hardly be condemned out-of-hand as "immoralities."

What truly distinguishes the offenses commonly thought of as "against morals" is not their relation to morality but the absence of ordinary justification for punishment by a non-theocratic state. The ordinary justification for secular penal controls is preservation of public order. The king's peace must not be disturbed, or, to put the matter in the language of our time, public security must be preserved. Individuals must be able to go about their lawful pursuits without fear of attack, plunder, or other harms. This is an interest that only organized law enforcement can effectively safeguard. If individuals had to protect themselves by restricting their movements to avoid dangerous persons or neighborhoods, or by restricting their investments for fear of violent dispossession, or by employing personal bodyguards and armed private police, the economy would suffer, the body politic would be rent by conflict of private armies, and men would still walk in fear.

No such results impend from the commission of "morals offenses." One has only to stroll along certain streets in Amsterdam to see that prostitution may be permitted to flourish openly without impairing personal security, economic prosperity, or indeed the general moral tone of a most respected nation of the Western World. Tangible interests are not threatened by a neighbor's rash decision to marry two wives or (to vary the case for readers

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who may see this as economic suicide) by a lady's decision to be supported by two husbands, assuming that the arrangement is by agreement of all parties directly involved. An obscene show, the predilection of two deviate males for each other, or the marriage of first cousins—all these leave nonparticipants perfectly free to pursue their own goals without fear or obstacle. The same can be said of certain nonsexual offenses, which I shall accordingly treat in this paper as "morals offenses": cruelty to animals, desecration of a flag or other generally venerated symbol, and mistreatment of a human corpse. What the dominant lawmaking groups appear to be seeking by means of morals legislation is not security and freedom in their own affairs but restraint of conduct by others that is regarded as offensive.

Accordingly, Professor Louis Henkin has suggested[1] that morals legislation may contravene constitutional provisions designed to protect liberty, especially the liberty to do as one pleases without legal constraints based solely on religious beliefs. There is wisdom in his warning, and it is the purpose of this article to review in the light of that warning some of the Model Penal Code[2] sections that venture into the difficult area of morals legislation. Preliminarily, I offer some general observations on the point of view that necessarily governed the American Law Institute as a group of would-be lawmakers. We were sensitive, I hope, to the supreme value of individual liberty, but aware also that neither legislatures nor courts will soon accept a radical change in the boundary between permissible social controls and constitutionally protected nonconformity.

I. Considerations in Appraising Morals Legislation

The first proposition I would emphasize is that a statute appearing to express nothing but religious or moral ideas is often defensible on secular grounds.[3] Perhaps an unrestricted flow of obscenity *will* encourage illicit sexuality or violent assaults on women, as some proponents of the ban believe. Perhaps polygamy and polyandry as well as adultery are condemnable on

1. See Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963), to which the present article is a companion piece. Controversy on the role of the state in the enforcement of morals has recently reached a new pitch of intensity. See Hart, Law, Liberty, and Morality (1963); Devlin, The Enforcement of Morals (1959); Devlin, *Law, Democracy, and Morality*, 110 U. Pa. L. Rev. 635 (1962). I shall not attempt to judge this debate, *cf.* Rostow, The Sovereign Prerogative 45-80 (1962), and I leave it to others to align the present essay with one or another of the sides. The recent controversy traverses much the same ground as was surveyed in the nineteenth century. See Mill, On Liberty (1859); Stephen, Liberty, Equality, Fraternity (1873).

2. The Model Penal Code is hereinafter cited as MPC. Unless otherwise indicated, all citations are to the 1962 Official Draft.

3. See McGowan v. Maryland, 366 U.S. 420 (1961). The Supreme Court upheld the constitutionality of a law requiring business establishments to close on Sunday, on the ground that such regulation serves the secular goal of providing a common day of rest and recreation, notwithstanding that the statute proscribed profanation of "the Lord's day."

Benthamite grounds. Perhaps tolerance of homosexuality *will* undermine the courage and discipline of our citizen militia, notwithstanding contrary indications drawn from the history of ancient Greece. The evidence is hopelessly inconclusive. Professor Henkin and I may believe that those who legislate morals are minding other peoples' business, not their own, but the great majority of people believe that the morals of "bad" people do, at least in the long run, threaten the security of the "good" people. Thus, *they* believe that it is their own business they are minding. And that belief is not demonstrably false, any more than it is demonstrably true. It is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo and its associated sensitivities, however irrational, in deference to a minority's skepticism.

The argument of the preceding paragraph does not mean that all laws designed to enforce morality are acceptable or constitutionally valid if enough people entertain a baseless belief in their social utility. The point is rather that recognizing irrational elements in the controversy over morals legislation, we ought to focus on other elements, about which rational debate and agreement are possible. For example, one can examine side effects of the effort to enforce morality by penal law. One can inquire whether enforcement will be so difficult that the offense will seldom be prosecuted and, therefore, risk of punishment will not in fact operate as a deterrent. One can ask whether the rare prosecutions for sexual derelictions are arbitrarily selected, or facilitate private blackmail or police discriminations more often than general compliance with legal norms. Are police forces, prosecution resources, and court time being wastefully diverted from the central insecurities of our metropolitan life—robbery, burglary, rape, assault, and governmental corruption?

A second proposition that must be considered in appraising morals legislation is that citizens may legitimately demand of the state protection of their psychological as well as their physical integrity. No one challenges this when the protection takes the form of penal laws guarding against fear caused by threat or menace. This is probably because these are regarded as incipient physical attacks. Criminal libel laws are clearly designed to protect against psychic pain;[4] so also are disorderly conduct laws insofar as they ban loud noises, offensive odors, and tumultuous behavior disturbing the peace. In fact, laws against murder, rape, arson, robbery, burglary, and other violent felonies afford not so much protection against direct attack—that can be done only by self-defense or by having a policeman on hand at the scene of the crime—

4. The Model Penal Code does not make libel a criminal offense. But this decision rests upon a judgment that the penal law is not a useful or safe instrument for repressing defamation; by no means is it suggested that the hurt experienced by one who is libelled is an inappropriate concern of government. See MPC § 250.7, comment 2 (Tent. Draft No. 13, 1961).

as psychological security and comfort stemming from the knowledge that the probabilities of attack are lessened by the prospect of punishment and, perhaps, from the knowledge that an attacker will be condignly treated by society.

If, then, penal law frequently or typically protects us from psychic aggression, there is basis for the popular expectation that it will protect us also from blasphemy against a cherished religion, outrage to patriotic sentiments, blatant pornography, open lewdness affronting our sensibilities in the area of sexual mores, or stinging aspersions against race or nationality. Psychiatrists might tell us that the insecurities stirred by these psychic aggressions are deeper and more acute than those involved in crimes of physical violence. Physical violence is, after all, a phenomenon that occurs largely in the domain of the ego; we can rationally measure the danger and its likelihood, and our countermeasures can be proportioned to the threat. But who can measure the dark turbulences of the unconscious when sex, race, religion or patriotism (that extension of father-reverence) is the concern?

If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arraigns himself against those views. Society owes a debt to martyrs, madmen, criminals, and professors who occasionally call into question its fundamental assumptions, but the community cannot be expected to make their first protests respectable or even tolerated by law. It is entirely understandable and in a sense proper that blasphemy should have been criminal in Puritan Massachusetts, and that cow slaughter in a Hindu state, hog-raising in a theocratic Jewish or Moslem state, or abortion in a ninety-nine per cent Catholic state should be criminal. I do not mean to suggest a particular percentage test of substantial unanimity. It is rather a matter of when an ancient and unquestioned tenet has become seriously debatable in a given community. This may happen when it is discovered that a substantial, although inarticulate, segment of the population has drifted away from the old belief. It may happen when smaller numbers of articulate opinion-makers launch an open attack on the old ethic. When this kind of a beach-head has been established in the hostile country of traditional faith, then, and only then, can we expect constitutional principles to restrain the fifty-one per cent majority from suppressing the public flouting of deeply held moral views.

Some may find in all this an encouragement or approval of excessive conservatism. Societies, it seems, are by this argument morally entitled to use force to hold back the development of new ways of thought. I do not mean it so. Rather, I see this tendency to enforce old moralities as an inherent characteristic of organized societies, and I refrain from making moral judgments on group behavior that I regard as inevitable. If I must make a moral judgment, it is in favor of the individual visionaries who are willing to pay the personal cost to challenge the old moral order. There is a morality in some

lawbreaking, even when we cannot condemn the law itself as immoral, for it enables conservative societies to begin the re-examination of even the most cherished principles.

Needless to say, recognizing the legitimacy of the demand for protection against psychic discomfort does not imply indiscriminate approval of laws intended to give such protection. Giving full recognition to that demand, we may still find that other considerations are the controlling ones. Can we satisfy the demand without impairing other vital interests? How can we protect religious feelings without "establishing" religion or impairing the free exercise of proselytizing faiths? How can we protect racial sensibilities without exacerbating race hatreds and erecting a government censorship of discussion?[5] How shall we prevent pain and disgust to many who are deeply offended by portrayal of sensuality without stultifying our artists and writers?

A third aspect of morals legislation that will enter into the calculations of the rational legislator is that some protection against offensive immorality may be achieved as a by-product of legislation that aims directly at something other than immorality. We may be uneasy about attempting to regulate private sexual behavior, but we will not be so hesitant in prohibiting the commercialization of vice. This is a lesser intrusion on freedom of choice in personal relations. It presents a more realistic target for police activity. And conceptually such regulation presents itself as a ban on a form of economic activity rather than a regulation of morals. It is not the least of the advantages of this approach that it preserves to some extent the communal disapproval of illicit sexuality, thus partially satisfying those who would really prefer outright regulation of morality. So also, we may be reluctant to penalize blasphemy or sacrilege, but feel compelled to penalize the mischievous or zealous blasphemer who purposely disrupts a religious meeting or procession with utterances desigued to outrage the sensibilities of the group and thus provoke a riot.[6] Reasonable rules for the maintenance of public peace incidentally afford a measure of protection against offensive irreligion. Qualms about public "establishment" of religion must yield to the fact that the alternative would be to permit a kind of violent private interference with freedom to conduct religious ceremonies.

It remains to apply the foregoing analysis to selected provisions of the Model Penal Code.

II. The Model Penal Code Approach

A. *Flagrant Affronts and Penalization of Private Immorality*

The Model Penal Code does not penalize the sexual sins, fornication, adultery, sodomy or other illicit sexual activity not involving violence or

5. See MPC § 250.7 & comments 1-4 (Tent. Draft No. 13, 1961) ("Fomenting Group Hatred"). The section was not included in the Official Draft of 1962.

6. See MPC §§ 250.8, 250.3 & comment (Tent. Draft No. 13, 1961).

imposition upon children, mental incompetents, wards, or other dependents. This decision to keep penal law out of the area of private sexual relations approaches Professor Henkin's suggestion that private morality be immune from secular regulation. The Comments in Tentative Draft No. 4 declared:

> The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences. Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.[7]

Although this passage expresses doubt as to the constitutionality of state regulation of morals, it does so in a context of "widely divergent views of the seriousness of various moral derelictions." Thus, it does not exclude the use of penal sanctions to protect a "moral consensus" against flagrant breach. The Kinsey studies and others are cited to show that sexual derelictions are widespread and that the incidence of sexual dereliction varies among social groups. The Comments proceed to discuss various secular goals that might be served by penalizing illicit sexual relations, such as promoting the stability of marriage, preventing illegitimacy and disease, or forestalling private violence against seducers. The judgment is made that there is no reliable basis for believing that penal laws substantially contribute to these goals. Punishment of private vice is rejected on this ground as well as on grounds of difficulty of enforcement and the potential for blackmail and other abuse of rarely enforced criminal statutes.[8] The discussion with regard to homosexual offenses follows a similar course.[9]

The Code does, however, penalize "Open Lewdness"—"any lewd act which [the actor] . . . knows is likely to be observed by others who would be affronted or alarmed."[10] The idea that "flagrant affront to commonly held notions of morality" might have to be differentiated from other sorts of im-

7. MPC § 207.1, comment at 207 (Tent. Draft No. 4, 1955).

8. MPC § 207.1, comment at 205-10 (Tent. Draft No. 4, 1955).

9. MPC § 207.5, comment at 278-79 (Tent. Draft No. 4, 1955). "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities. . . . [T]here is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others." MPC § 207.5, comment at 277-78 (Tent. Draft No. 4, 1955).

10. MPC § 251.1; *cf.* MPC § 213.5, which penalizes exposure of the genitals for the purpose of arousing or gratifying sexual desire in circumstances likely to cause affront or alarm. This latter offense carries a heavier penalty than open lewdness, "since the behavior amounts to, or at least is often taken as, threatening sexual aggression." MPC § 213.4 & 251.1, comment at 82 (Tent. Draft No. 13, 1961).

morality appeared in the first discussions of the Institute's policy on sexual offenses, in connection with a draft that would have penalized "open and notorious" illicit relations.[11] Eventually, however, the decision was against establishing a penal offense in which guilt would depend on the level of gossip to which the moral transgression gave rise. Guilt under the open lewdness section turns on the likelihood that the lewd act itself will be observed by others who would be affronted.

Since the Code accepts the propriety of penalizing behavior that affects others only in flagrantly affronting commonly held notions of morality, the question arises whether such repression of offensive immorality need be confined to acts done in public where others may observe and be outraged. People may be deeply offended upon learning of private debauchery. The Code seems ready at times to protect against this type of "psychological assault," at other times not. Section 250.10 penalizes mistreatment of a corpse "in a way that [the actor] . . . knows would outrage ordinary family sensibilities," although the actor may have taken every precaution for secrecy. Section 250.11 penalizes cruel treatment of an animal in private as well as in public. On the other hand, desecration of the national flag or other object of public veneration, an offense under section 250.9, is not committed unless others are likely to "observe or discover." And solicitation of deviate sexual relations is penalized only when the actor "loiters in or near any public place" for the purpose of such solicitation.[12] The Comments make it clear that the target of this legislation is not private immorality but a kind of public "nuisance" caused by congregation of homosexuals offensively flaunting their deviance from general norms of behavior.[13]

As I search for the principle of discrimination between the morals offenses made punishable only when committed openly and those punishable even when committed in secrecy, I find nothing but differences in the intensity of the aversion with which the different kinds of behavior are regarded. It was the intuition of the draftsman and his fellow lawmakers in the Institute that disrespectful behavior to a corpse and cruelty to animals were more intolerable affronts to ordinary feelings than disrespectful behavior to a flag. Therefore, in the former cases, but not the latter, we overcame our general reluctance to extend penal controls of immorality to private behavior that disquiets people solely because they learn that things of this sort are going on.

Other possible explanations do not satisfy me. For example, it explains nothing to say that we wish to "protect" the corpse or the mistreated dog, but not the flag itself. The legislation on its face seeks to deter mistreatment of all three. All three cases involve interests beyond, and merely represented

11. MPC § 207.1 & comment at 209 (Tent. Draft No. 4, 1955).
12. MPC § 251.3; see text accompanying note 35 *infra*.
13. MPC § 251.3, status note at 237.

by, the thing that is immediately "protected." It is not the mistreated dog who is the ultimate object of concern; his owner is entirely free to kill him (though not "cruelly") without interference from other dog owners. Our concern is for the feelings of other human beings, a large proportion of whom, although accustomed to the slaughter of animals for food, readily identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings. The desire to protect a corpse from degradation is not a deference to this remnant of a human being—the dead have no legal rights and no legislative lobby—but a protection of the feelings of the living. So also in the case of the flag, our concern is not for the bright bit of cloth but for what it symbolizes, a cluster of patriotic emotions. I submit that legislative tolerance for private flag desecration is explicable by the greater difficulty an ordinary man has in identifying with a country and all else that a flag symbolizes as compared with the ease in identifying with a corpse or a warm-blooded domestic animal. This is only an elaborate way of saying that he does not feel the first desecration as keenly as the others. Perhaps also, in the case of the flag, an element of tolerance is present for the right of political dissent when it goes no further than private disrespect for the symbol of authority.[14]

A penal code's treatment of private homosexual relations presents the crucial test of a legislator's views on whether a state may legitimately protect people from "psychological assault" by repressing not merely overt affront to consensus morals but also the most secret violation of that moral code. As is often wise in legislative affairs, the Model Penal Code avoids a clear issue of principle. The decision against penalizing deviate sexuality is rested not merely on the idea of immunity from regulation of private morality, but on a consideration of practical difficulties and evils in attempting to use the penal law in this way.[15] The Comments note that existing laws dealing with homosexual relations are nullified in practice, except in cases of violence, corruption of children, or public solicitation. Capricious selection of a few cases for prosecution, among millions of infractions, is unfair and chiefly benefits extortioners and seekers of private vengeance. The existence of the criminal law prevents some deviates from seeking psychiatric aid. Furthermore, the pursuit of homosexuals involves policemen in degrading entrapment practices, and diverts attention and effort that could be employed more usefully against the crimes of violent aggression, fraud, and government corruption, which are the overriding concerns of our metropolitan civilization.

If state legislators are not persuaded by such arguments to repeal the laws against private deviate sexual relations among adults, the constitutional

14. Not all legislatures are so restrained. See, *e.g.*, PA. STAT. ANN. tit. 18, § 4211 (1945) ("publicly or privately mutilates, defaces, defiles or tramples upon, or casts contempt either by words or act upon, any such flag"). Query as to the constitutionality of this effort to repress a private expression of political disaffection.

15. MPC § 207.5, comment at 278-79 (Tent. Draft No. 4, 1955).

issue will ultimately have to be faced by the courts. When that time comes, one of the important questions will be whether homosexuality is in fact the subject of a "consensus." If not, that is, if a substantial body of public opinion regards homosexuals' private activity with indifference, or if homosexuals succeed in securing recognition as a considerable minority having otherwise "respectable" status, this issue of private morality may soon be held to be beyond resolution by vote of fifty-one per cent of the legislators.[16] As to the status of homosexuality in this country, it is significant that the Supreme Court has reversed an obscenity conviction involving a magazine that was avowedly published by, for, and about homosexuals and that carried on a ceaseless campaign against the repressive laws.[17] The much smaller group of American polygamists have yet to break out of the class of idiosyncratic heretic-martyrs[18] by bidding for public approval in the same group-conscious way.

B. *The Obscenity Provisions*

The obscenity provisions of the Model Penal Code best illustrate the Code's preference for an oblique approach to morals offenses, *i.e.*, the effort to express the moral impulses of the community in a penal prohibition that is nevertheless pointed at and limited to something else than sin. In this case the target is not the "sin of obscenity," but primarily a disapproved form of economic activity—commercial exploitation of the widespread weakness for titillation by pornography. This is apparent not only from the narrow definition of "obscene" in section 251.4 of the Code, but even more from the narrow definition of the forbidden behavior; only sale, advertising, or public exhibition are forbidden, and noncommercial dissemination within a restricted circle of personal associates is expressly exempt.[19]

Section 251.4 defines obscenity as material whose "predominant appeal is to prurient interest . . . ."[20] The emphasis is on the "appeal" of the material, rather than on its "effect," an emphasis designed explicitly to reject

16. *Cf.* Robinson v. California, 371 U.S. 905 (1962) (invalidating statute that penalized addiction to narcotics).

17. One, Inc. v. Oleson, 355 U.S. 371 (1958), *reversing* 241 F.2d 772 (9th Cir. 1957). On the "homosexual community" see Helmer, *New York's "Middle-class" Homosexuals*, Harper's, March 1963, p. 85 (evidencing current non-shocked attitude toward this minority group).

18. See Cleveland v. United States, 329 U.S. 14 (1946); Reynolds v. United States, 98 U.S. 145 (1878).

19. MPC § 251.4(2), (3).

20. (1) *Obscene Defined.* Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience. . . .
MPC § 251.4(1).

prevailing definitions of obscenity that stress the "effect."[21] This effect is traditionally identified as a tendency to cause "sexually impure and lustful thoughts" or to "corrupt or deprave."[22] The Comments on section 251.4 take the position that repression of sexual thoughts and desires is not a practicable or legitimate legislative goal. Too many instigations to sexual desire exist in a society like ours, which approves much eroticism in literature, movies, and advertising, to suppose that any conceivable repression of pornography would substantially diminish the volume of such impulses. Moreover, "thoughts and desires not manifested in overt antisocial behavior are generally regarded as the exclusive concern of the individual and his spiritual advisors."[23] The Comments, rejecting also the test of tendency to corrupt or deprave, point out that corruption or depravity are attributes of character inappropriate for secular punishment when they do not lead to misconduct, and there is a paucity of evidence linking obscenity to misbehavior.[24]

The meretricious "appeal" of a book or picture is essentially a question of the attractiveness of the merchandise from a certain point of view: what makes it sell. Thus, the prohibition of obscenity takes on an aspect of regulation of unfair business or competitive practices. Just as merchants may be prohibited from selling their wares by appeal to the public's weakness for gambling,[25] so they may be restrained from purveying books, movies, or other commercial exhibition by exploiting the well-nigh universal weakness for a look behind the curtain of modesty. This same philosophy of obscenity control is evidenced by the Code provision outlawing advertising appeals that attempt to sell material "whether or not obscene, by representing or suggesting that it is obscene."[26] Moreover, the requirement under section 251.4 that the material go "substantially beyond customary limits of candor" serves to exclude from criminality the sorts of appeal to eroticism that, being prevalent, can hardly give a particular purveyor a commercial advantage.

It is important to recognize that material may predominantly "appeal" to prurient interest notwithstanding that ordinary adults may actually respond to the material with feelings of aversion or disgust. Section 251.4 explicitly

21. See MPC § 207.10, comment 6 at 19, 29 (Tent. Draft No. 6, 1957) (§ 207.10 was subsequently renumbered § 251.4).

22. See MPC § 207.10, comment 6 at 19 n.21, 21 (Tent. Draft No. 6, 1957).

23. MPC § 207.10, comment 6 at 20 (Tent. Draft No. 6, 1957).

24. MPC § 207.10, comment 6 at 22-28 (Tent. Draft No. 6, 1957).

25. See FTC v. R. F. Keppel & Brother, 291 U.S. 304 (1934) (sale of penny candy by device of awarding prizes to lucky purchasers of some pieces). The opinion of the Court declares that Section 5 of the Federal Trade Commission Act, proscribing unfair methods of competition, "does not authorize regulation which has no purpose other than . . . censoring the morals of business men," *id.* at 313, but that the Commission may prevent exploitation of consumers by the enticement of gambling, as well as imposition upon competitors by use of a morally obnoxious selling appeal.

26. MPC § 251.4(2)(e). Equivalent provisions appear in some state laws. *E.g.*, N.Y. PEN. LAW § 1141. There is some doubt whether federal obscenity laws reach such advertising. See Manual Enterprises, Inc. v. Day, 370 U.S. 478, 491 (1962). *But see* United States v. Hornick, 229 F.2d 120, 121 (3d Cir. 1956).

encompasses material dealing with excretory functions as well as sex, which the customer is likely to find *both* repugnant and "shameful" and yet attractive in a morbid, compelling way. Not recognizing that material may be repellent and appealing at the same time, two distinguished commentators on the Code's obscenity provisions have criticized the "appeal" formula, asserting that "hard core pornography," concededly the main category we are trying to repress, has no appeal for "ordinary adults," who instead would be merely repelled by the material.[27] Common experience suggests the contrary. It is well known that policemen, lawyers, and judges involved in obscenity cases not infrequently regale their fellows with viewings of the criminal material. Moreover, a poll conducted by this author among his fellow law professors—"mature" and, for the present purposes, "ordinary" adults—evoked uniformly affirmative answers to the following question: "would you look inside a book that you had been certainly informed has grossly obscene hard-core pornography if you were absolutely sure that no one else would ever learn that you had looked?" It is not an answer to this bit of amateur sociological research to say that people would look "out of curiosity." It is precisely such shameful curiosity to which "appeal" is made by the obscene, as the word "appeal" is used in section 251.4.

Lockhart and McClure, the two commentators referred to above, prefer a "variable obscenity" concept over the Institute's "constant obscenity" concept. Under the "constant obscenity" concept, material is normally judged by reference to "ordinary adults."[28] The "variable obscenity" concept always takes account of the nature of the contemplated audience; material would be obscene if it is "primarily directed to an audience of the sexually immature for the purpose of satisfying their craving for erotic fantasy."[29] The preference for "variable obscenity" rests not only on the mistaken view that hard-core pornography does not appeal to ordinary adults, but also on the ground that this concept facilitates the accomplishment of several ancillary legislative goals, namely, exempting transactions in "obscene" materials by persons with scholarly, scientific, or other legitimate interests in the obscene and prohibiting the advertising of material "not intrinsically pornographic as if it were hard-core pornography."[30] The Code accomplishes these results by explicit exemption for justifiable transactions in the obscene and by specific prohibition of suggestive advertising.[31] This still seems to me the better way to draft a criminal statute.

27. See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 72-73 (1960).

28. The Model Penal Code employs the "variable obscenity" concept in part, since § 251.4(1) provides that "appeal" shall be judged with reference to the susceptibilities of children or other specially susceptible audience when it appears that the material is designed for or directed to such an audience.

29. Lockhart & McClure, *supra* note 27, at 79.

30. *Ibid.*

31. MPC § 251.4(2)(e), (3) (a).

The Code's exemption for justifiable dealing in obscene material provides a workable criterion of public gain in permitting defined categories of transactions. It requires no analysis of the psyche of customers to see whether they are sexually immature or given to unusual craving for erotic fantasy. It makes no impractical demand on the sophistication of policemen, magistrates, customs officers, or jurymen. The semantics of the variable obscenity concept assumes without basis that the Kinsey researchers were immune to the prurient appeal of the materials with which they worked.[32] Would it not be a safe psychiatric guess that some persons are drawn into research of this sort precisely to satisfy in a socially approved way the craving that Lockhart and McClure deplore? In any event, it seems a confusing distortion of language to say that a pornographic picture is not obscene as respects the blasé [sexually mature?] shopkeeper who stocks it, the policeman who confiscates it, or the Model Penal Code Reporter who appraises it.

As for the prohibition against suggestive advertising, this is certainly handled more effectively by explicitly declaring the advertisement criminal without regard to the "obscene" character of the material advertised than by the circumlocution that an advertisement is itself to be regarded as obscene if it appeals to the cravings of the sexually immature. That kind of test will prove more than a little troublesome for the advertising departments of some respectable literary journals.

If the gist of section 251.4 is, as suggested above, commercial exploitation of the weakness for obscenity, the question arises whether the definition of the offense should not be formulated in terms of "pandering to an interest in obscenity," *i.e.*, "exploiting such an interest primarily for pecuniary gain . . . ."[33] This proposal, made by Professor Henry Hart, a member of the Criminal Law Advisory Committee, was rejected because of the indefiniteness of "exploiting . . . primarily for pecuniary gain," and because it would clearly authorize a bookseller, for example, to procure any sort of hard-core pornography upon the unsolicited order of a customer. "Exploiting . . . primarily for pecuniary gain" is not a formula apt for guiding either judicial interpretation or merchants' behavior. It is not clear what the prosecution would have to prove beyond sale of the objectionable item. Would advertising or an excessive profit convert sale into "exploitation"? Would the formula leave a bookseller free to enjoy a gradually expanding trade in obscenity so long as he kept his merchandise discreetly under the counter and let word-of-mouth publicize the availability of his tidbits? Despite these difficulties, it may well be that the Code section on obscenity has a constitutional infirmity of

32. *Cf.* United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957), in which, absent a statutory exemption, the court was compelled to rely on variable obscenity in order to sanction import of obscene pictures by the [Kinsey] Institute for Sex Research.

33. MPC § 207.10(1) (Tent. Draft No. 6, 1957) (alternative).

the sort that concerned Professor Henkin insofar as the section restricts the freedom of an adult to buy, and thus to read, whatever he pleases. This problem might be met by framing an appropriate exemption for such transactions to be added to those now set forth in subsection (3).

The rejection of the Hart "pandering" formulation highlights another aspect of section 251.4, namely, its applicability to a class of completely noncommercial transactions that could not conceivably be regarded as "pandering." This ban on certain noncommercial disseminations results from the fact that subsection (2) forbids every dissemination except those exempted by subsection (3), and subsection (3) exempts noncommercial dissemination only if it is limited to "personal associates of the actor." Thus, a general distribution or exhibition of obscenity is prohibited even though no one is making money from it: a zealot for sex education may not give away pamphlets at the schoolyard gates containing illustrations of people engaged in erotic practices; a rich homosexual may not use a billboard on Times Square to promulgate to the general populace the techniques and pleasures of sodomy. Plainly, this is not the economic regulation to which I have previously tried to assimilate the Code's anti-obscenity regulations. But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: "Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraints we seek to cultivate through family, church, and school." The interest being protected is not, directly or exclusively, the souls of those who might be depraved or corrupted by the obscenity, but the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.

C. *Prostitution*

The prostitution provisions of the Model Penal Code, like the obscenity provisions, reflect the policy of penalizing not sin but commercial exploitation of a human weakness, or serious affront to public sensibilities. The salient features of section 251.2 are as follows. Sexual activity is penalized only when carried on as a business or for hire. The section covers any form of sexual gratification. "Promoters" of prostitution—*i.e.*, procurers, pimps, keepers of houses of prostitution—are penalized more severely than the prostitutes. The patron of the prostitute is subject to prosecution for a "violation" only, that is, he may be fined but not jailed, and the offense is, by definition, not a "crime." Dependents of a prostitute are not declared to be criminals by virtue of the fact that they live off the proceeds of prostitution, as under many present laws, but the circumstance of being supported by a prostitute

is made presumptive evidence that the person supported is engaged in pimping or some other form of commercial exploitation of prostitution.

The main issues in the evolution of the Institute's position on prostitution were, on the one hand, whether to penalize all "promiscuous" intercourse even if not for hire or, on the other hand, whether even intercourse for hire should be immune from prosecution when it is carried on discreetly out of the public view. Those who favored extending the criminal law to promiscuous noncommercial sexuality did so on secular, not moral, grounds. They pointed to the danger that promiscuous amateurs would be carriers of venereal disease, and they argued that law enforcement against hire-prostitution would be facilitated if the law, proceeding on the basis that most promiscuity is accompanied by hire, dispensed with proof of actual hire. Others doubted the utility or propriety of the law's intervening in private sexual relations on the basis of a vague and moralistic judgment of promiscuity; and these doubts prevailed.

It was more strenuously contended that the Model Penal Code should, following the English pattern, penalize prostitution only when it manifests itself in annoying public solicitation.[34] This position was defeated principally by the argument that "call-houses" were an important cog in the financial machine of the underworld, linked to narcotics peddling and other "rackets." I find more interesting and persuasive the parallel between this problem of the discreet exploitation of sex and the suggestion in the obscenity context that discreet sale of obscene books to patrons who request them might not constitute "pandering." Both distinctions present the difficulty of drawing an administrable line between aggressive merchandising and passive willingness to make profits by catering to a taste for spicy life or literature.

Other provisions of section 251.2 also demonstrate its basic orientation against undesirable commerce rather than sin. The grading of offenses under the section ranges from the classification of the patron's guilt as a noncriminal "violation," through the "petty misdemeanor" classification (thirty day maximum imprisonment) for the prostitute herself, and the "misdemeanor" classification (one year maximum) for minor participation in the promotion of prostitution, to the "third degree felony" classification (five year maximum) for owning or managing a prostitution business, bringing about an association between a prostitute and a house of prostitution, or recruiting persons into prostitution. Clearly, from the point of view of the sinfulness of illicit sexual relations, the patron's guilt is equal to that of the prostitute, but it is the seller rather than the sinful customer who is labelled a criminal. And the higher the rank in the selling organization, the graver the penalty—a significant departure from the normal assimilation of accessorial guilt to that of the principal offender. This emphasis on the businessman in sex is underscored

34. See Street Offenses Act, 1959, 7 & 8 Eliz. 2, c. 57.

by the fact that the higher penalties applicable to him do not depend on whether he is the instigator of the relationship; if a prostitute persuades someone to manage her illicit business or to accept her in a house of prostitution, it is he, not she, who incurs the higher penalty.

In one respect, the Code's provisions against illicit sexual activity depart from the regulation of commerce. Section 251.3 makes it a petty misdemeanor to loiter "in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations." This extension is explained as follows in the accompanying status note:

> [T]he main objective is to suppress the open flouting of prevailing moral standards as a sort of nuisance in public thoroughfares and parks. In the case of females, suppression of professionals is likely to accomplish that objective. In the case of males, there is a greater likelihood that non-professional homosexuals will congregate and behave in a manner grossly offensive to other users of public facilities.[35]

The situation is analogous to that of noncommercial dissemination of obscenity by billboard publication or indiscriminate gratuitous distribution of pornography. In a community in which assemblages of "available" women evoke the same degree of violent resentment as assemblages of homosexuals, it would be consistent with this analysis to make public loitering to solicit illicit heterosexual relations an offense regardless of proof of "hire." On the other hand, the legislator may well decide that even in such a community it is not worth risking the possibility of arbitrary police intrusion into dance halls, taverns, corner drug stores, and similar resorts of unattached adolescents, on suspicion that some of the girls are promiscuous, though not prostitutes in the hire sense.

III. The Code's Position on Abortion

In present day, heterogeneous, secular American society, the law of abortion operates in an area of fundamentally conflicting views of morality. Here is no question of imposing conformity to community consensus on a few heretics or visionaries, but of employing the machinery of the state to coerce some major groups in the population to conform to the ideals of others. It is not a question of restricting the freedom of a few eccentrics to avoid inflicting great psychic injury on the bulk of the population, but of restricting the freedom of scores of millions of citizens, having conflicting but equally respectable sensibilities, to be protected.

The principle features of section 230.3—"Abortion"—are as follows. The Code recognizes additional justifications beyond those in prevailing law, which condemns any abortion unless continued pregnancy threatens the life

35. See MPC § 251.3, status note at 237.

or health of the mother. The additional justifications in the Code are the substantial risk that the child will be born with grave physical or mental defect or the fact that the pregnancy resulted from rape, incest, or other felonious intercourse, including in the last category any pregnancy resulting from illicit intercourse with a girl under sixteen. Justifiable abortions may be performed only by licensed physicians and, except in emergencies, only in a licensed hospital. A woman is not liable for aborting herself, or attempting to do so, during the first twenty-six weeks of pregnancy (the greater risk to the woman and the progression of the foetus toward viable humanity in more advanced pregnancy distinguish the situation from self-abortion during early pregnancy). Subsection (5) penalizes "pretended abortion," *i.e.*, it is made a felony to use abortion procedures on a woman who is not pregnant. Subsection (6) confines trade in abortifacients to professional channels of pharmacy and medicine. Subsection (7) makes it clear that the ban on abortion is not to apply to the new oral "contraceptives" notwithstanding that they technically function after conception, *i.e.*, after the egg cell has already been fertilized by the sperm.

The data and argument presented in the Comments[36] support a more radical revision of prevailing abortion law than is embodied in the text of section 230.3. In substance, the secular case against a severely restrictive law rests upon evidence that the demand for abortions is so widespread and insistent that forcing the satisfaction of this demand into illicit channels results in financial victimization and death for thousands of women. This demand is by no means confined to cases in which the mother's life or health is threatened or in which there is reason to anticipate a defective child, or to cases of pregnancy resulting from felonious intercourse. It has been said that " 'the vast majority of all abortions equalling 90 per cent occur among married pregnant women, especially those between 25 and 35 years of age who have had several children.' "[37] These women seek abortions when the financial resources of the family are limited so that they fear hardships to themselves and their other children if additional burdens are taken on. The prospective mother may have a job or professional career that she cannot or will not interrupt for a confinement. She may have been deserted by her husband, or he may be an alcoholic or otherwise incompetent or dependent. Abortion may be sought by an unmarried woman who has already had several illegitimate children, all of whom stand a good chance of being added to the rolls of delinquency. None of these situations is brought within the bounds of lawful abortion by section 230.3.

The Comments also express a view of the proper relationship of criminal

36. MPC § 207.11, comment 1 (Tent. Draft No. 9, 1959).

37. MPC § 207.11, comment 1 at 147 (Tent. Draft No. 9, 1959), quoting TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED 387-88 (1936).

law and morality which, if accepted, would have carried the liberalization of the abortion law well beyond the moderate expansion of justifications provided in the section:

> The criminal law in this area cannot undertake or pretend to draw the line where religion or morals would draw it. Moral demands on human behavior can be higher than those of the criminal law precisely because violations of those higher standards do not carry the grave consequence of penal offenses. Moreover, moral standards in this area are in a state of flux, with wide disagreement among honest and responsible people. The range of opinion among reasonable men runs from deep religious conviction that any destruction of incipient human life, even to save the life of the mother, is murder, to the equally fervent belief that the failure to limit procreation is itself unconscionable and immoral if offspring are destined to be idiots, or bastards, or undernourished, mal-educated rebels against society. For many people sexual intercourse divorced from the end of procreation is a sin; for multitudes of others it is one of the legitimate joys of living. Those who think in utilitarian terms on these matters can differ among themselves as widely as moralists. Voluntary limitation of population can be seen as national suicide in a world-wide competition for numerical superiority, while to others uncontrolled procreation appears equally suicidal as tending to aggravate the pressure of population on limited natural resources and so driving nations to mutually destructive wars. To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions. Accordingly, here as elsewhere, criminal punishment must be reserved for behavior that falls below standards generally agreed to by substantially the entire community.[38]

Had the foregoing considerations been given free play in the drafting of the section on abortion, the Institute would have had to go at least as far as the Swedish and Danish legislation, which permits abortion, not only on the ground of danger to the life or health of the mother, but also

> "if, taking into account the living conditions of the woman and other factors, there is reason to believe that her physical or mental strength would be seriously impaired by the birth and care of the child."[39]

Under this legislation, a board composed of physicians, lawyers, and sociologists passes upon the propriety of abortion in particular cases, and the range of considerations in effect permits justification on social grounds as well as on health and eugenic grounds.

The failure of section 230.3 to reflect completely the logic of the Comments is inadequately explained in a single sentence at the end of Com-

38. MPC § 207.11, comment 1 at 150-51 (Tent. Draft No. 9, 1959).

39. Quoted from the Swedish statute as set forth in MPC § 207.11, appendix at 166 (Tent. Draft No. 9, 1959). Compare the Danish provisions, quoted in MPC § 207.11, appendix at 165 (Tent. Draft No. 9, 1959), which require serious danger to health, but direct that in appraising this danger account shall be taken not only of physical or mental disease, but also of "weakness" under the conditions under which the woman has to live.

ment 6 referring to the absence of any "body of experience with such a law [*i.e.*, of the Swedish type] in the context of American Society" on which to base recommendations for a model provision. "[T]he draft refrains from taking any position for or against [additional] justifications . . . ." It would, perhaps, have been more candid to say that most of those involved in drafting and reviewing the Model Penal Code felt that any effort to introduce additional justifications would be so offensive to Catholic opinion as to impair seriously the legislative prospects of the Code as a whole.

What the Code does in abortion law is to move moderately away from the strict position against interruption of pregnancy. Although its provisions may not be in conformity with natural or moral law as seen by the Catholic Church, it may prove to be not utterly offensive to the substantial body of Catholic opinion that does not insist upon conforming secular legislation in every respect to the moral requirements of natural law. To other groups in the population, the Code's inhibitions on abortion still amount to a very substantial restriction of freedom. It is difficult to formulate a secular justification for this restriction, at least as applied to interruptions of pregnancy at an early stage for reasons that are persuasive to a large proportion of the population. Professor Henkin's thesis as to the unconstitutionality of punishing private sin may well be tested here rather than in the field of obscenity, so long as obscenity control efforts are limited to restraints on commercialization and restraints on public violation of standards that command virtually universal adherence.